

# AD HOC COMMITTEE OF INDEPENDENT INFORMATION PROVIDERS

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Federal Communications Commission  
1919 M. St, N.W., Room 222  
Washington, D.C., 20554

April 23, 1998

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Subject: Dockets Nos. 95-20 and 98-10  
Computer III Further Remand Proceedings: Bell Operating Company  
Provision of Enhanced Services

Dear Ms. Salas:

Enclosed please find the original and six copies of the following two filings, submitted jointly by Arthur Evans, individually and in behalf of The Ad Hoc Committee Of Independent Information Providers, hereinafter jointly referred to as "FILERS":

✓ (a): Incomplete Reply Comment- Statements, and

(b) EMERGENCY MOTION FOR EXTENSION OF TIME TO FILE-SUPPLEMENT REPLY  
COMMENTS

Sincerely Yours,

*AE*  
Arthur Evans

CC: ACTIVE PARTIES  
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FEDERAL COMMUNICATIONS COMMISSION  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Computer III Further Remand Proceedings:  
Bell Operating Company  
Provision of Enhanced Services

1998 Biennial Regulatory Review --  
Review of Computer III and ONA  
Safeguards and Requirements

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)  
) CC Docket No. 95-20  
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)  
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) CC Docket No. 98-10  
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INCOMPLETE REPLY COMMENT STATEMENTS FILED JOINTLY BY  
ARTHUR EVANS, INDIVIDUALLY (PRO SE) AND  
THE AD HOC COMMITTEE OF INDEPENDENT INFORMATION PROVIDERS

266 Jerico Turnpike, Suite F  
Floral Park, New York, 11001  
516-354-2255

April 23, 1998

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EXHIBIT #1 p.3

CASES 93-C-0451 and 91-C-1249

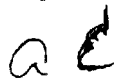
Arthur Evans and the Ad Hoc Committee Of Independent Information Providers ("FILERS") herein jointly file these incomplete reply comment statements, subject to FILERS Emergency Motion For an Extension Of Time to Supplement Reply Comments. The Ad Hoc Committee Committee Of Independent Information Providers, is an informal organization of individuals (including Arthur Evans), and individuals which provide the public with one minute recorded news and information reports via subscription to Bell Atlantic's 976 prefixed Mass Announcement Network Service. (Public calls orginiating in the downstate New York Lata. to 976 news reports are tariffed in New York State, at a rate of 40¢, Currently, calls originating outside New York State are currently completed to the news reports broadcast over Bell Atlantic's 976 facilities, without compensation to AHCIIP's members and other 976 news providers ("NPs"). Note that in addition, to the COMMISSION's continued authority over interstate transport of traffic to this Bell Atlantic exchange dedicated to news and information, the COMMISSION also has jurisdiction over these 976 facilities utilized by 976 NPs for electronic publishing services, pursuant to the Telecommunications Act of 1996. and the still in effect Computer II and III regulations, (see the significant record of past complaints (made pursuant to the AT& T consent decree), by 976 based news providers, in which Judge Harold Greene construed 976 NP's news services within the scope of electronic publishing, (see complaints of Phone Programs, Megaphone, et al)).

POINT #1: BASED UPON THE SUBSTANTIAL RECORD OF PAST MISCONDUCT (POSSIBLY CONTINUING) BY BELL ATLANTIC against 976 based NPs, FILERS oppose in their entirety Bell Atlantic 's 3/27/98 comments and proposed modification of COMMISSION regulations. as they affect 976 NPs and competitive voice news and information services. FILERS herein incorporate herein incorporate by reference the May 29, 1997. Opinion 97-7, of the New York State Public Service Commission, ("NYPSC"), in Case 93-c-0451, in which the NYPSC affirmed most of the Gross Negligence and Willful Misconduct findings contained in the 1/17/96 Recommended Decision Of Judge Frank Robinson. (see Exhibit #1, excerpts).

POINT #2: Based upon the past record of misconduct and the continuing failure of Bell Atlantic to comply with both COMMISSION and NYPSC orders to provide fundamental unbundling and number portability to 976 NPs, FILERS disagree with BELL SOUTH, other RBOC, and BELL ATLANTIC's objections to the future extension by the COMMISSION of rights as carriers to 976 NP's under Section 251.

POINT #3: Based upon the past record of misconduct, and continuing failure of Bell Atlantic to comply with both COMMISSION and NYPSC orders to provide fundamental unbundling and number portability to 976 NPs. FILERS disagree with BELL SOUTH's, other RBOC, and BELL ATLANTIC objections to the COMMISSION's adoption of regulations banning Bell Atlantic's Joint marketing of intralata voice information services.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be 'A E' with a stylized flourish.

Arthur Evans

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

EXHIBIT #1, p1

RECOMMENDED DECISION BY  
ADMINISTRATIVE LAW JUDGE FRANK S. ROBINSON

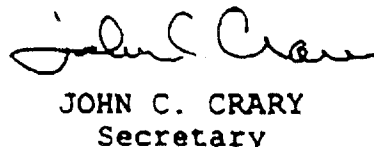
CASE 93-C-0451 - Proceeding on Motion of the Commission to Review Rates, Charges, Rules and Regulations of New York Telephone Company Affecting the Information Provisioning Industry.

CASE 91-C-1249 - Proceeding on Motion of the Commission Concerning Tariff Revisions to Delete Provisions Pertaining to Charging Interexchange Carriers For Calls to Certain Community Information Service Numbers.

NOTICE OF SCHEDULE FOR FILING EXCEPTIONS

(Issued January 17, 1997)

Attached is the Recommended Decision of Administrative Law Judge Frank S. Robinson in these proceedings, together with a copy of the Commission's rules governing the procedures to be followed. Briefs on exceptions will be due February 6, 1997 and briefs opposing exceptions will be due February 21, 1997.

  
JOHN C. CRARY  
Secretary

based matters by small businesses and those with limited resources should not be deterred by the cost, especially where the harm has been long-sustained and covert. The IPs conclude that here, the interest of justice as well as the tariff's integrity dictate a remedy which takes account of the cost to the IPs of these proceedings.

BRN likewise seeks recovery of its cost of participating in this proceeding. BRN repeats the litany of misconduct allegations, and asserts that company misconduct has forced the IPs to spend hundreds of thousands of dollars to participate in these proceedings. BRN too invokes PSL \$93, which it says provides for not only compensatory damages, where a telephone company breaches its duty, but also recovery of legal fees.

The company deems the IPs' requests unprecedented and baseless. It says PSL \$93 permits recovery in court only, and cites a Commission holding that the law does not provide for reimbursement of legal costs.<sup>1</sup> The company also rejects the IPs' equitable arguments, saying it is not a rogue organization nor one that has ever acted capriciously concerning the IPs. Rather, it says, it dealt with an imperfect system; acted quickly, fairly and reasonably under the circumstances; and always acted with the best intentions to fulfill its tariff obligations to compensate the IPs.

## VII. FINDINGS ON THE MAIN ISSUE

### A. Introduction

I conclude, based upon the entire record, that New York Telephone Company has been guilty of gross negligence and willful misconduct.

My conclusions will be elaborated fully below, but their thrust may be summed up as follows:

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<sup>1</sup> Case 95-G-0336, Town and Village of Gouverneur against St. Lawrence Gas Co., Memorandum Approved As Recommended And So Ordered, issued May 7, 1996.

The company's long-term deception of both IPs and the Commission concerning its unauthorized Autrax call count adjustments was willful misconduct.

The company was seriously negligent in pushing ahead with the Ericsson cutover in one gulp, rather than phasing it in, which would have enabled it to deal more efficaciously with the problems and avert serious harm to IPs.

The unexpected troubles that did attend the cut-over show that the company's planning for it was inadequate.

Likewise inadequate was the company's handling of the troubles when they arose, further evidencing insufficient preparation.

These basic elements of the cutover picture, taken together, constituted gross negligence.

Furthermore, the company engaged in willful misconduct in striving to cover up its negligence and to defeat efforts to call it to account. This extended to willful misconduct in the company's litigation of this proceeding.

I also conclude that the IPs were in fact harmed by the improper, deceitful and grossly negligent way in which New York Telephone provided service to them.

#### B. Mr. Lobosco

I will address this subject in depth because of its unusual and sensitive nature.

##### 1. Procedural Circumstances

At the outset, it is acknowledged that the company has not cross-examined Mr. Lobosco. But, lest it claim any denial of due process, I will recapitulate the circumstances, even though my ruling in the matter has already been upheld by the Commission on interlocutory appeal.

At New York Telephone's turn to cross-examine Mr. Lobosco, it requested a 30-day continuance to investigate his allegations of improprieties. While I did rule that Mr. Lobosco might be recalled for cross-examination on that subject, I

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

OPINION NO. 97-7

- CASE 93-C-0451 - Proceeding on Motion of the Commission to Review Rates, Charges, Rules and Regulations of New York Telephone Company Affecting the Information Provisioning Industry.
- CASE 91-C-1249 - Proceeding on Motion of the Commission Concerning an Ordinary Tariff Filing of New York Telephone Company to Remove Tariff Language No Longer Required Which Referenced the Billing of Customers for Non-Access Charges Under the Telephone Company Exchange Service Tariffs for Calls to Certain Community Information Services.

OPINION AND ORDER CONCERNING COMPLAINTS

Issued and Effective: May 29, 1997



CASES 93-C-0451 and 91-C-1249

settlement of Case 90-C-1148<sup>1</sup> and that implementation of one of Judge Robinson's suggestions for curing the blocking problem would, in substance, amount to a modification of that settlement--without notice to numerous affected parties or opportunity for them to be heard. MCI also calls attention to Judge Robinson's observations concerning New York Telephone's agreement with MPS Intelenet concerning the handling of 976 traffic between a caller on one local exchange network and an IP on another network. MCI notes that while the Judge did not explicitly propose that the Commission adopt any billing and collection or compensation rules for internetwork calls, "neither . . . did [he] explicitly negative" such a proposal. MCI says the Commission should make no determination on these matters in this proceeding but should leave them instead to consensual negotiations among the affected parties.

The Ad Hoc Committee of Independent Information Providers (AHCIIP) argues that the recommended decision was generally excellent but that Judge Robinson violated AHCIIP's due process rights in various ways and that AHCIIP should be awarded a greater refund than as contemplated by the recommended decision. In particular, AHCIIP says it should receive a refund of all charges collected by New York Telephone during the Autrax era.

#### DISCUSSION

Although we agree with the Judge's findings and conclusions concerning New York Telephone's conduct in connection with the cutover of the Ericsson switch, we conclude that the question of an appropriate remedy must be left to the courts. The company's behavior vis-a-vis the IPs has indeed been

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<sup>1</sup> See Case 90-C-1148, Order Approving Settlement (issued August 7, 1992).

CASES 93-C-0451 and 91-C-1249

disgraceful, as fully explained in the Recommended Decision.<sup>1</sup> But Judge Robinson's proposed "refund" remedy amounts, in substance, to an award of damages, which we lack jurisdiction to make. The Autoras case,<sup>2</sup> cited by the Judge as support for his refund recommendation, is distinguishable because it involved refunds of monthly tariff charges for impaired service, whereas here, even though the same tariff provision is applicable, the only charges collected by New York Telephone (and thus the only charges that could be refunded) were those for unimpaired service--i.e., the per-call charges for completed calls. Also, in Autoras the Commission expressly rejected the sort of computation recommended by Judge Robinson here and instead required refunds of all charges for the entire period of impaired service. A partial refund at a judgmentally derived level that takes into account the extent of the harm suffered by the refund

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<sup>1</sup> See, in particular, the discussion at pp. 107-143 of the Recommended Decision. Contrary to New York Telephone's arguments that the Judge mischaracterized or exaggerated the evidence of gross negligence and deliberate misconduct, we believe that with only very limited exceptions, the picture he has painted accurately reflects what happened, both before and after the cutover, and fairly assigns responsibility for the post-cutover operating problems suffered by the IPs. We reserve judgment pending further review (see infra) on the Judge's findings--to which New York Telephone has excepted--that the company's sponsorship of its "call pumping" testimony was an abuse of the Commission's procedures and that the company "reneged" on a prior commitment when it refused to make the law firm report concerning Mr. Lobosco's allegations available to the parties. We also note that in discussing the remedy issue (an issue we do not reach), Judge Robinson mistakenly asserted that New York Telephone had failed to respond to a January 8, 1991 letter from staff concerning post-cutover problems. The company did respond to staff's letter; see Exhibit 17 (Attachment 14).

<sup>2</sup> See Case 28804, New York Telephone Company (Autoras Service); Opinion No. 86-3 (issued February 18, 1986); Opinion No. 86-3(A) (issued May 6, 1986); Opinion No. 86-3(B) (issued August 28, 1987).

EXHIBIT #1 p.7

CASES 93-C-0451 and 91-C-1249

New York Telephone. Third, we agree with MCI's suggestion that we refrain from adopting any general rule or policy concerning intercarrier compensation or other terms of interconnection with respect to 976 traffic. As MCI argues, the terms of interconnection should be negotiated between and among carriers, at least in the first instance. Fourth, we reject AHCIIP's various claims that its due process rights were infringed. AHCIIP was indulged at every turn by the Judge, and its claims of procedural unfairness are without merit.

The Commission orders:

1. New York Telephone Company is found to have committed gross negligence and to have engaged in deliberate misconduct in connection with the September 1990 transfer of 976 service to the Ericsson switch.
2. The January 17, 1997 recommended decision of Administrative Law Judge Frank Robinson is adopted and made a part hereof to the extent it is consistent with the opinion and order. Exceptions to his recommended decision are granted to the extent explained above and are denied in all other respects.
3. Within 60 days from the date of this opinion and order, New York Telephone Company shall modify the Ericsson switch in the manner specified at pages 62-63 of the company's brief on exceptions.
4. Within 90 days from the date of this opinion and order, New York Telephone Company shall file revisions to its Tariff P.S.C No. 900 to unbundle the rates for Mass Announcement Service as specified in this opinion and order and to eliminate from the revenue requirement underlying the rates so unbundled any amounts over and above the actual cost of providing such service. The revised material shall be filed on not less than 30 days' notice and shall not become effective until approved by the Commission.
5. Within 90 days from the date of this opinion and order, New York Telephone shall file a report concerning the

CERTIFICATE OF SERVICE

I Arthur Evans, do certify that on April 23, 1998, that a copy of both the Incomplete Reply Comment-Statements and the Emergency Motion For An Extension Of Time To Supplement Reply Comments of joint filers Arthur Evans and the Ad Hoc Committee of Independent Information Providers were deposited in the U.S. Mail, first class, postage prepaid to the persons on the attached service list. In addition, I Arthur Evans, do certify that I have this day made best efforts to notify orally by telephone both COMMISSION staff personnel and all active parties serving initial comments in this proceeding phase of my filing of an Emergency Motion For Extension Of Time.

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